

No. 14-3406

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD

Petitioner-Appellant,

v.

GATES & SONS BARBEQUE OF MISSOURI, INC.

Respondent-Appellee

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APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD

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**BRIEF OF RESPONDENT-APPELLEE**  
**GATES & SONS BARBEQUE OF MISSOURI, INC.**

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## **CORPORATE DISCLOSURE STATEMENT**

Gates & Sons Barbeque of Missouri is a Missouri corporation with its principal place of business in Missouri. Pursuant to Federal Rule of Appellate Procedure 26.1, Respondent, Gates & Sons Barbeque of Missouri, Inc. states that it does not have any parent corporations and not publicly held corporation owns 10% or more of its stock.

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## **JURISDICTIONAL STATEMENT**

This case is before the Court on the application of the National Labor Relations Board to enforce an Order of the Board finding that Gates committed certain unfair labor practices. Jurisdiction of this Court is invoked under Section 10(e) of the National Labor Relations Act, as amended (29 U.S.C. §151, 160(e)), as an application filed October 27, 2014, for enforcement of an Order of the National Labor Relations Board dated September 16, 2014. The Board's Decision and Order issued on September 16, 2014, and is reported at 361 NLRB No. 46.

## **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Whether the Board erred in adopting the ALJ's finding that the protected concerted activities of Gates employees were a motivating factor in Gates' decision to discontinue its policy of providing one free meal to each employee per shift worked.

2. Whether the Board erred in finding that the General Counsel satisfied the burden of showing that Gates' alleged decision to take action against an employee was motivated, at least in part by unlawful considerations.

## **STATEMENT OF THE CASE**

### **I. The Alleged Unfair Labor Practices and Decisions of the ALJ and National Labor Relations Board**

The General Counsel alleged that Gates & Sons Barbeque of Missouri, Inc. (hereinafter “Gates”) engaged in an unfair labor practice when it discontinued its employee benefit of providing one meal to each employee during the employee’s work shift.

After the presentation of evidence before the Administrative Law Judge (hereinafter “ALJ”) held that Gates “[v]iolated Section 8(a)(1) of the Act by discontinuing the free employee meal benefit...because employees there engaged in protected activity...”

After review by the Board, the Board adopted the recommended Order of the ALJ with one amendment regarding the computation of the make-whole remedy.

### **II. Background**

Based upon alleged labor practice charges filed by the Workers’ Organizing Committee, Kansas City (hereinafter referred to as the “WOC”), the Board’s General Counsel issued a complaint alleging that Gates committed several violations of the Act. Following a hearing, the administrative law judge issued a decision and recommended order finding that Gates violated the Act by discontinuing the daily meal. After considering exceptions to the judge’s decision filed by Gates and the General Counsel, the Board issued its Decision and Order affirming, and modified, the findings and recommend order of the judge. The determination that an employer committed unfair labor practices cannot be based upon an ALJ’s credibility determination, but it must be supported by sufficient and substantial evidence. In this case, substantial evidence does not exist to prove that Gates retaliated against its employees by discontinuing the daily meal.

On July 31, 2013, the Workers' Organizing Committee, Kansas City (hereinafter referred to as the "WOC"), acting on behalf of nine employees of Gates, filed an original charge, and an amended charge on November 15, 2013, which included purported allegations that "On or about July 31, 2013, the Employer discriminatorily revoked employee benefits including daily lunches...in retaliation for employees protected, concerted activities." A Complaint and Notice of Hearing was issued to Gates on November 22, 2013, pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. and Section 102.15 of the Rules and Regulations of the National Labor Relations Board. In the Complaint and Notice of Hearing, the WOC's requests included a request for reinstatement of employee work shift meals that were alleged to have been previously provided to employees before the July 30, 2013 work stoppage.

On March 18, 2014, a hearing commenced before Administrative Law Judge Paul A. Bogas ("ALJ Bogas") in Overland Park, Kansas to litigate the issue of employee meals. On June 17, 2014, ALJ Bogas found Gates to have engaged in "[A]n unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act, on or about August 1, 2013, when it discontinued the free employee meal benefit at its Main Street location..." As a result, ALJ Bogas' Order included an order for Gates to: "Reinstate the free employee meal benefit at the Main Street location."

Pursuant to Section 102.45 of the National Labor Relations Board's Rules and Regulations, this matter was transferred to the National Labor Relations Board, which issued a Decision and Order on September 16, 2014. The National Labor Relations Board's Decision and Order included the affirmation of ALJ Bogas' order to reinstate the free employee meal benefit at the Main Street location.



On October 23, 2014, The National Labor Relations Board filed an Application for Enforcement of an Order of the National Labor Relations Board, to enforce the September 16, 2014 Decision and Order, in Board Case No. 14-CA-110229.

### **SUMMARY OF ARGUMENT**

Gates did not violate Section 8(a)(1) of the Act by discontinuing the free employee meal benefit because employees ceased work concertedly and engaged in a protected strike. Gates' decision to discontinue the employee meals was made before any Gates management was notified of the work stoppage and was based solely on the lack of employee performance, low customer satisfaction, and not employee participation in protected concerted activity. Testimony before the ALJ establishes that Gates management made the decision to conclude the provision of free work shift employee meals before the July 30, 2013 work stoppage. In fact, Gates received no advance notice of the July 30, 2013 work stoppage. The first notice of a work stoppage was delivered to Gates the morning of the work stoppage. The decision to cease the provision of work shift employee meals did not have any correlation to the work stoppage. The decision was a store-wide decision, and was directed to all employees at the 3205 Main Street restaurant and not limited to the nine employees who participated in the work stoppage.

## STANDARD OF REVIEW

The Board's findings of fact are reviewed by the Court "to determine if they are supported by substantial evidence on the record as a whole." *Midwest Precision Heating & Cooling, Inc., v. NLRB*, 408 F.3d 450, 457 (8<sup>th</sup> Cir. 2005). Substantial evidence includes "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *NLRB v. La-Z-Boy Midwest*, 309 F.3d 1054, 1058 (8th Cir. 2004). The Board's application of the law to the facts is reviewed under the substantial evidence standard. *NLRB v. United. Ins. Co.*, 390 U.S. 254, 260 (1968).

Further, the Board's findings must "nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490, 71 S.Ct. 456 (1951).

## ARGUMENT

### **I. Substantial evidence does not support the Board's finding that Gates & Sons Barbeque of Missouri, Inc. (Gates) violated Section 8(a)(1) of the National Labor Relations Act when it discontinued its policy of providing one free meal to each employee per shift worked.**

Board findings are reviewed by appellate courts "to determine if they are supported by substantial evidence on the record as a whole." *See Midwest Precision Heating & Cooling, Inc. v. NLRB*, 408 F.3d 450, 457 (8<sup>th</sup> Cir. 2005). Evaluating an employer's decision must not be based solely on credibility determinations, but also substantial evidence. In this case, neither the ALJ's nor the Board's determinations are supported by substantial evidence.

Gates provided a legitimate reason for its decision to discontinue its policy of providing one free meal benefit to each employee; however, Gates' motive remains an alleged violation of the

act. The *Wright Line* analysis applies here as Gates' motivation to discontinue its policy of providing one free meal benefit to each employee per shift worked, remains as the issue. *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 780 (8th Cir. 2013) (citing *Wright Line*, 251 NLRB 1083 (1980)). Under the *Wright Line* analysis, the General Counsel bears the initial burden of showing that Respondent's decision to discontinue the meals was motivated by unlawful considerations. *Id.* (citing *NLRB v. MDI Commer. Servs.*, 175 F.3d 621 (8th Cir. 1999)). The General Counsel must meet the burden by establishing the following: (1) the employees were engaged in protected activity; (2) the employer knew of the employees' protected activity; and (3) the employer acted in retaliation of the alleged protected activity. *Id.* (quoting *NLRB v. Rockline Indus.*, 412 F.3d 962, 966 (8th Cir. 2005))

In this case, substantial evidence does not exist to show that Gates knew of any employees' protected activity at the time it decided to discontinue its employee meal benefit. Further, there is not substantial evidence to show that Gates acted in retaliation of its employees striking, a protected activity. There was no evidence presented proving that Gates was notified or was aware of an employee strike either before, or at the time Gates management decided to discontinue the employee meals during the management meeting. Moreover, Gates Manager Colin Shipley testified that he and Gates Manager Claudia Williams decided to discontinue the employee meals weeks before the strike on July 30, 2013. Gates would have taken the same action even absent the employees' protected strike activity. There is not one shred of evidence to suggest that Gates was notified of the July 30, 2013 before Gates management decided to discontinue the employee meals. The evidence presented establishes that Gates management previously made a decision, and merely implemented it according to the agreement among Gates management. The Board "is not free to prescribe what inferences from the evidence it will

accept and reject, but must draw all those inferences that the evidence fairly demands.” *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998). The fact that the implementation occurred on or around July 30, 2013, the date of the strike, is purely coincidental, and is not sufficient to establish an unlawful motive.

### **CONCLUSION**

For the foregoing reasons, Gates requests this court to overturn or reverse the decision of the National Labor Relations Board. Substantial evidence does not exist showing that Gates had any knowledge of a work stoppage at the time it decided to discontinue the employee meals, or that the work stoppage caused the employee meals to be discontinued.

Dated this 8<sup>th</sup> day of December, 2014.

**GATES & SONS BARBEQUE OF MISSOURI, INC.**  
Respondent-Appellee

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## **CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing Brief of Respondent-Appellee Gates & Sons Barbeque of Missouri, Inc. complies with the requirements of FRAP 28, 29, 31, and 32 as well as the Eighth Circuit Rules 25A, and 28A. I have relied on the word count feature of our firm's word-processing system, Microsoft Word 2007®; the foregoing brief uses a proportionally spaced type in 12 point and contains 369 lines and 2,214 words. The undersigned certifies that the brief has been scanned for viruses and is virus free.

/s/ Willis L. Toney

Willis L. Toney

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 8<sup>th</sup> day of December, 2014, the above and foregoing was filed electronically with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

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